LIBRARY
SUPREME COURT, U. S.

MAY 19

No. 71-1258

In the Supreme Court of the United States

OCTOBER TERM, 1971

LAWRENCE DAMANGONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1258

LAWRENCE DAMANGONE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a non-jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of willful failure to keep his classification notice (SSS Form 110) in his possession, in violation of 50 U.S.C. App. 462(a). He was sentenced to six months' imprisonment and two and a half years' probation on the condition that he engage in work in the national interest during the probationary period; and he was fined $3,000. The court of appeals affirmed. (Pet. App. 8a).

Petitioner registered with his local board on May 7, 1964, and received II-S student deferments until February 13, 1968, when he was reclassified I-A.

Petitioner was ordered to report for induction on June 11, 1968, but refused induction. He was convicted

466-162—72 —1

of refusing induction on October 16, 1968, but the court of appeals reversed the conviction (419 F. 2d 762 (C.A. 2)), entering final judgment on February 27, 1970.

On March 17, 1970, petitioner was reclassified I-A and mailed a classification card (SSS Form 110) on March 18, 1970. (Tr. 17).[1] He was subsequently ordered to report for induction on May 19, 1970 (Tr. 18), but he failed to report.

On June 11, 1970, an agent of the Federal Bureau of Investigation interviewed petitioner regarding possible selective service violations. During the course of that interview, petitioner stated that he did not have his classification card (SSS Form 110) in his possession (Tr. 88) and that he had given the card to a named speaker at a peace rally on April 15, 1970 (Tr. 88). The present indictment, trial and conviction followed.[2]

Petitioner contends here that 32 C.F.R. 1623.5 requiring him to possess a classification card, is an invasion of his liberty without due process of law.[3] However, petitioner has not demonstrated that requiring him to possess a classification card subjects him to any substantial interference with his liberty and we sub-

[1] "Tr." references are to the transcript of the proceedings below which are a part of the record filed with the Clerk of this Court.

[2] The second count of the indictment, charging petitioner with failure to report for induction into the Armed Forces, was dismissed by the district court. (Pet. App. 5a).

[3] This argument was not raised at the district court level, and therefore, it should not be reviewed by this Court in the absence of exceptional circumstances. See *Hormel* v. *Helvering*, 312 U.S. 552.

mit that it does not. This Court in *United States* v. *O'Brien*, 391 U.S. 367, 377–378, recognized that "The issuance of certificates indicating the * * * eligibility classification of individuals is a legitimate and substantial administrative aid in the functioning of this system," and that "legislation to insure the continuing availability of issued certificates serves a legitimate and substantial purpose in the system's administration." All courts considering this regulation have upheld it against constitutional attack.[4]

Petitioner also contends here, as he did below, that if non-possession of his classification card is a crime, it is only a crime under Section 12(b)(6), which provides penalties for violation of "regulations, * * * relating to * * * possession of [classification] certificate[s]," and not under Section 12(a), which establishes the same penalty for the knowing refusal "to perform any duty required * * * [by the selective service] regulations." However, the regulation that petitioner violated, 32 C.F.R. 1623.5, creates a single duty: to carry the classification certificate. Sections 12(b)(6) and 12(a) simply provide, in different language, the same penalty for violation of that single duty.[5] This

[4] See *United States* v. *Kime*, 188 F.2d 677 (C.A. 7), certiorari denied, 342 U.S. 823; *United States* v. *Taylor*, 442 F.2d 1327 (C.A. 9); *United States* v. *Branigan*, 299 F. Supp. 225 (S.D. N.Y.); *United States* v. *Hertlein*, 143 F. Supp. 742 (E.D. Wisc.).

[5] See *United States* v. *Couming*, 445 F.2d 555 (C.A.1), certiorari denied, 404 U.S. 949 (prosecution for non-possession under Section 12(a)); see also *United States* v. *Branigan*, 299 F. Supp. 225, 230 (S.D. N.Y.), in which the court said:

"That earlier prosecutions for non-possession may have been grounded on subsection (b) and not on subsection (a) of section 12 is of no significance; subsection (a) is broad enough

Court in *United States* v. *O'Brien*, *supra*, 391 U.S. at 380, spoke on the issue of alternative avenues of prosecution, holding that Congress can employ such alternatives, if the alternatives are not used concurrently creating multiple punishment. And here there is no claim of multiple punishment.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

MAY 1972.

---

to permit prosecution for the offense here alleged. The choice of subsection to be used rests with the prosecutor."